Supreme Court, U.S.
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No. 93-1959

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

STEVEN KROUSE,

*Petitioner,*

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

## BRIEF IN OPPOSITION

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24 pp

## QUESTION PRESENTED

Whether the District of Columbia Court of Appeals properly applied applicable federal common law principles in holding that the FELA's three-year statute of limitations commenced to run on a negligent assignment claim when petitioner knew or should have known of his injury and that its possible cause was work-related.

## RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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No. 93-1959

IN THE
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OCTOBER TERM, 1993

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STEVEN KROUSE,

*Petitioner*,

*v.*

NATIONAL RAILROAD PASSENGER CORPORATION,

*Respondent*.

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**On Petition for Writ of Certiorari to the District of Columbia Court of Appeals**

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## BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

Petitioner Steven Krouse ("Krouse" or "petitioner") commenced this action on March 2, 1990 against respondent National Railroad Passenger Corporation ("Amtrak" or "respondent") under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1981), seeking damages due to injuries allegedly caused by Amtrak's negligence. Petitioner's theory of liability was that beginning on January 16, 1987, four days after he suffered an ankle injury while at work, Amtrak

negligently assigned Krause to perform his regular duties, thereby aggravating his original injury (A-1a-4a).[1]

Although petitioner did not comr ence his action until more than 37 months after he was allegedly first the subject of the negligent work assignment, the trial court (Superior Court of the District of Columbia) concluded that the FELA's three-year statute of limitations, 45 U.S.C. § 56 (1981), did not bar Krouse's claim because it did not begin to accrue until petitioner finally left Amtrak's employment some two years later, in early 1989. According to the trial court's decision, it was legally irrelevant whether petitioner had been on notice of a possible negligent assignment claim against Amtrak more than three years before he finally commenced his action (*see* A-4a-5a).

Accordingly, at trial, petitioner sought to recover damages for all injuries suffered by him beginning on January 16, 1987, when the alleged negligent assignment began. The jury rendered a verdict in petitioner's favor on his negligent assignment claim and he was awarded a judgment for $262,500 (A-1a-2a, 4a).

On appeal, the District of Columbia Court of Appeals (the "D.C. court of appeals") reversed and remanded for further proceedings. The D.C. court of appeals held that Krouse's cause of action under the FELA's statute of limitations accrued when the petitioner knew or should have known of his injury and that its possible cause was work-related (A-2a, 15a-16a). The D.C. court of appeals also concluded that, from the record, it could not "say when [Krouse] should have known that his

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[1] Citation to "A- " is to the opinion of the District of Columbia Court of Appeals that is attached as Appendix A to Krouse's Petition for Writ of Certiorari. The opinion is reported at 627 A.2d 489 (D.C. App. 1993). Remaining citations are to the trial court record in this action.

continued walking on ballast was aggravating his condition as opposed to any belief he might have had that it was his original injury and the recovery process associated with it which was causing his problem" (A-16a). The appellate court thus remanded the action to the trial court, instructing that Krouse would have to demonstrate to the fact-finder that the three-year limitations period was tolled between January 12, 1987, when his ankle was originally injured, and March 2, 1987, which was three years before he finally filed suit (A-16a).

## STATEMENT OF FACTS

Petitioner injured himself on January 12, 1987 while working the evening shift at Amtrak as a car repairman (Trial Tr. 245, 249-250). On the morning of January 16, 1987, petitioner's supervisor, Bernard Campbell, sent Krouse to Amtrak's medical dispensary, where Dr. Josefino Ceballos diagnosed a "severely sprained" ankle, with ecchymosis of the right ankle and foot (Trial Tr. 256-257, 340, 382). Dr. Ceballos recommended that Krouse wear a figure-eight ankle brace, avoid excessive walking and work "light duty for three weeks" (Trial Tr. 257, 396-397).

That same day, when supervisor Campbell was told to give plaintiff light duty, he immediately assigned Krouse to "desk-type work" (Trial Tr. 259). About two hours later, however, a union official complained to Campbell, in petitioner's presence, about Krouse performing work that was out of his craft, at which point Campbell told petitioner he would have to return to his regular duties as a car repairman (Trial Tr. 260-261). Petitioner continued to perform regular duties from January 16, 1987 until he left Amtrak's employ more than two years later (*see* A-3a-4a). He never once went back to Amtrak's medical dispensary, or asked permission to do so (Trial Tr. 290-292).

Krouse acknowledged that after returning to his regular duties on January 16, 1987, he continued to experience a mild swelling of the ankle and a limp (Trial Tr. 263). Krouse also admitted noticing that these nagging symptoms occurred "more in the evenings and toward the end of the week" (Trial Tr. 263), and that his ankle hurt worse when he returned to work in mid to late January 1987, following a brief vacation (Trial Tr. 295, 307, 309).

Despite his continued symptoms, Krouse signed an Amtrak report on February 3, 1987 in which he certified that "during the 240 hrs. [sic] immediately following my injury [on January 12] I performed or was able to perform . . . all of the duties of the position in which I was working" (Trial Tr. 296; Def. Ex. 2). Moreover, on February 23, 1987, Krouse signed a second Amtrak form certifying that he could "perform fully and acceptably and without any extra assistance all of the duties customarily included in my assignment" and did "not have any restriction of motion as a result of [the January 12, 1987] accident" (Trial Tr. 298-299; Def. Ex. 1).

Krouse testified at trial that he complained intermittently of his pain to his supervisors and others between January 13, 1987 and early 1988 (*see* A-3a). However, for about two years, he never once sought medical assistance from Amtrak, or from anyone else (Trial Tr. 290-292). Moreover, he not only continued to perform his regular duties for Amtrak, he also worked long hours on outside jobs involving prolonged standing or physical labor (Trial Tr. 262-263, 276-277, 297-304, 321).

Finally, on January 24, 1989, Krouse consulted legal counsel, the same counsel who would represent petitioner in this FELA action (Trial Tr. 305-306). Counsel immediately directed petitioner to a Dr. Frank Watkins (Trial Tr. 303, 305-306). Dr. Watkins concluded that petitioner's prolonged walking on uneven surfaces had delayed the healing of his

initial injury and had aggravated that injury (*see* A-4a). The doctor advised light duty only and told the petitioner to avoid walking over ballast (*see* A-4a). After Amtrak's manager advised Krouse that the recommended work was not available, Krouse marked off work on January 25, 1989 and never returned (Trial Tr. 268, 275; *see* A-4a-5a).

This lawsuit was finally commenced in March 2, 1990, some thirteen months after petitioner left Amtrak's employment (*see* A-4a-5a, 16a).

## ARGUMENT

### I. THE DISTRICT OF COLUMBIA COURT OF APPEALS PROPERLY APPLIED FEDERAL SUBSTANTIVE LAW APPLICABLE TO THE FELA CLAIM

In interpreting the FELA's limitations provision, the D.C. court of appeals was required to apply applicable federal substantive law. *See, e.g., Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 335 (1988); *Burnett v. New York Central R.R.*, 380 U.S. 424, 426-27 (1965); *Urie v. Thompson*, 337 U.S. 163, 174, 182 (1949). Contrary to petitioner's assertion, that is precisely what the D.C. court of appeals did (*see* A-6a-16a).[2]

Section 6 of the FELA, 45 U.S.C. § 56 (1981), mandates that "[n]o action shall be maintained under this [Act] unless

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[2] In applying federal law, the D.C. court of appeals took pains to note that it was relying in part on *United States v. Kubrick*, 444 U.S. 11 (1979), a decision of this Court frequently relied upon in applying the FELA's statute of limitations, notwithstanding the fact that the D.C. court previously had declined to follow *Kubrick* in a dental malpractice case, which was governed by local, rather than federal, common law (*see* A-6a-8a and n. 8).

commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. Compliance with this limitations provision is construed as a condition precedent to recovery under the FELA, and failure to bring suit timely "not only bars the claimant's remedy, but it also destroys the employer's liability." *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983). *See also Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 360-361 (3d Cir. 1986); *Frasure v. Union Pac. R.R.*, 782 F.Supp. 477, 479 (C.D. Cal. 1991); *Stokes v. Union Pac. R.R.*, 687 F. Supp. 552, 555 (D. Wyo. 1988); *Lloyd v. Missouri Pac. R. Co*, 832 S.W.2d 310, 313 (Mo. App. E.D. 1992). The burden thus is on the plaintiff to establish that his case falls within an exception to the three-year limitations provision. *Emmons*, 701 F.2d at 1117-1118; *Frasure*, 782 F. Supp. at 480; *Ricard v. Elgin, Joliet & Eastern Ry.*, 750 F. Supp. 372, 375 (N.D. Ind. 1990); *Stokes*, 687 F. Supp. at 555. *See also Drazen v. United States*, 762 F.2d 56, 60 (7th Cir. 1985).

Under well-settled federal law, a cause of action under the FELA normally accrues when the plaintiff's legally protected rights have been invaded or the tortious act which causes injury has been committed. *Clay v. Union Carbide Corp.*, 828 F.2d 1103, 1106 (5th Cir. 1987); *DuBose v. Kansas City S. Ry.*, 729 F.2d 1026, 1028-1029 (5th Cir.), *cert. den.*, 469 U.S. 854 (1984). *See also Brassard v. Boston & Maine R.R.*, 240 F.2d 138, 141 (1st Cir. 1957). An FELA plaintiff has a "completely ripe cause of action" once there is a breach of duty followed by an invasion of plaintiff's interest, and "[t]he mere fact that the extent of the damage [is] not immediately manifest [does] not postpone the accrual of the cause of action." *Brassard*, 240 F.2d at 141.

Since petitioner in this case claimed he was negligently assigned to regular duty on January 16, 1987, and also admitted

to an immediate awareness of nagging symptoms associated with his regular duty assignments, Krouse clearly bore the burden of establishing in the trial court below that he was not time-barred under the FELA even though he waited well over three years before commencing his FELA suit. As the D.C. court of appeals' decision demonstrates (A-7a-15a), a plaintiff with notice of his possible claim cannot brush aside his burden under the FELA simply by arguing that defendant has committed a "continuing tort."

In assessing whether petitioner could meet his burden simply by claiming a "continuing tort," the D.C. court of appeals analyzed two key decisions of this Court, *Urie v. Thompson*, 337 U.S. 163, and *United States v. Kubrick*, 444 U.S. 111. These decisions have been widely applied to FELA actions in which the plaintiff's injury has an indefinite onset and progresses over many years **unnoticed** by the prospective plaintiff (A-7a-9a). *See, e.g., Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1094-1095 (7th Cir. 1990) (hearing loss); *Albert v. Maine Central R.R.*, 905 F.2d 541, 543-544 (1st Cir. 1990), *aff'g Jones v. Maine Central R.R.*, 690 F. Supp. 73 (D. Me. 1988) (hearing loss); *Townley v. Norfolk & W. Ry.*, 887 F.2d 498, 501 (4th Cir. 1989) (black lung); *Kichline*, 800 F.2d 358-359 (pulmonary disease); *DuBose*, 729 F.2d at 1028-1030 (pulmonary disease).

In *Urie*, this Court concluded that in the unusual circumstance where a specific date of injury "cannot be determined" because it results from continued exposure to a harmful condition over a period of time, a plaintiff's cause of action accrues when the injury manifests itself. *Urie*, 337 U.S. at 170. Absent such a rule, this Court stressed, a plaintiff's remedy under the FELA would be "delusive" because he would be charged with knowledge of a possible claim "at some past moment in time, unknown and **inherently unknowable** even in

retrospect." *Urie*, 337 U.S. at 169 (emphasis added). Thi Court declined to attach such dire consequences in the face o what it pointedly termed a plaintiff's "**blameless** ignorance, nor could it reconcile those consequences with the "traditiona purposes of statutes of limitations, which conventionally requir the assertion of claims within a specified period of time afte **notice** of the invasion of legal rights." *Urie*, 337 U.S. at 17( (emphasis added). *Urie* thus established a "discovery" rul tolling the FELA's three-year statute of limitations **only** durin the period in which the plaintiff's injury was "inherentl unknowable" and the plaintiff was acting with "blameles ignorance" -- *i.e.*, without notice of a possible claim.

The *Urie* discovery rule, as applied in FELA actions, wa later given additional judicial gloss by this Court's decision i *Kubrick*, 444 U.S. 111, a case arising under the Federal Tor Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.* (1981). I *Kubrick*, this Court concluded that once a plaintiff is i possession of the critical facts of both an injury and its governing cause, the action accrues **regardless** of whether the plaintiff actually is aware of the legal wrong that has occurred. *Kubrick*, 444 U.S. at 120-123. *See also Fries*, 909 F.2d at 1094-95; *Albert*, 905 F.2d at 543-44; *Kichline*, 800 F.2d at 358-59; *DuBose*, 729 F.2d at 1029-1030.

In *Kubrick*, this Court stressed that statutes of limitation represent a "pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Kubrick*, 444 U.S. at 117, quoting *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). Such statutes afford plaintiffs "what the legislature deems a reasonable time to present their claims" and concomitantly "protect defendants and the courts from having to deal with cases in

which the search for truth may be seriously impaired." *Kubrick*, 444 U.S. at 117. *Kubrick* instructs that a court is "not free to construe [a federally-legislated limitations period] so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117.

Echoing *Urie*, this Court in *Kubrick* sharply distinguished between a plaintiff whose injury "may be unknown or unknowable" (444 U.S. at 122) and a plaintiff who **does** have notice of his injury and its possible cause:

> The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. . . . There are others who can tell him if he has been wronged, and he need only ask.

*Kubrick*, 444 U.S. at 122. According to this Court:

> A plaintiff . . . armed with the facts about the harm done to him, **can protect himself by seeking advice** in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would **undermine the purpose of the limitations statute.** (Emphasis added)

*Kubrick*, 444 U.S. at 123.

Based on the teachings of *Urie* and *Kubrick*, the courts have applied a discovery exception to the traditional accrual rule in FELA cases that is limited to injuries or illnesses which first manifest themselves some time after exposure to the harm began, concluding that the cause of action will first accrue for purposes of the FELA's limitations provision when a reasonable person knows or in the exercise of reasonable diligence should have known of the injury and its governing causes. *Fries*, 909

F.2d at 1095 (hearing loss); *Bealer v. Missouri Pac. R.R.*, 9
F.2d 38, 39 (5th Cir. 1991) (hearing loss); *Albert*, 905 F.2d
543-544 (hearing loss); *Townley*, 887 F.2d at 501 (black lun
*DuBose*, 729 F.2d at 1030 (pulmonary disease). *See a*
*Frasure*, 782 F. Supp. at 480-481 (hearing loss); *Ricard*, 750
Supp. at 374-75 (hearing loss); *Stokes*, 687 F. Supp. at 553-5
(hearing loss); *Roesch v. Chicago & N.W. Transp. Co.*, 19
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*Meier v. Chicago & N.W. Transp. Co.*, 1991 WL 49620 at p
(N.D. Ill. April 2, 1991) (hearing loss); *Alexander v. Misso*
*Pac. R.R.*, 827 S.W.2d 757 (Mo. App. 1992) (hearing los
The courts have repeatedly stressed that plaintiff **cann**
postpone the running of the three-year statute of limitatio
once he has notice of his potential claim. *See, e.g., Fries*, 9
F.2d at 1095 (to allow plaintiff to postpone the running of t
statute of limitations by negligently failing to investigate t
fact of and cause of his injury would thwart the intent of
U.S.C. § 56); *Albert*, 905 F.2d at 543 (legislative intent is th
the right to be free of stale claims comes to prevail over t
right to prosecute them); *Kichline*, 800 F.2d at 359 (plaint
must seek medical and legal advice and determine whether
sue or not); *Stoleson v. United States*, 629 F.2d 1265, 1269-
(7th Cir. 1980) (plaintiff armed with knowledge is no longer
mercy of defendant's specialized knowledge).

All of these FELA decisions necessarily involve alleg
continuing torts by defendants. Yet **none** of them suggests th
a plaintiff may continue to postpone the running of the FELA
limitations period regardless of when plaintiff has notice of h
potential claim. As such, they implicitly reject petitioner
attempt to create further inroads into the FELA's three-ye
statute of limitations through his "continuing tort" argumer
Moreover, numerous FELA decisions have **explicitly** rejecte
any purported "continuing tort" exception to the discovery ru

in FELA cases. *See Kichline*, 800 F.2d 360; *Ricard*, 750 F.Supp. at 375; *Courtney v. Union Pac. R. Co.*, 713 F.Supp. 305, 309-310 (E.D. Ark. 1989); *Stokes*, 687 F.Supp. at 668; *Johnson v. Norfolk & W. Ry. Co.*, 836 S.W.2d 83, 85 (Mo. App. E.D. 1992).

Despite this array of authority, petitioner persists in arguing that the applicable federal substantive law renders notice irrelevant when there is a "continuing tort" (Petition at 6-9).[3] He relies on two decisions, *Fletcher v. Union Pac. R.R.*, 621 F.2d 902 (8th Cir. 1980), *cert. den.*, 449 U.S. 1110 (1981) and *Fowkes v. Pennsylvania R. Co.*, 264 F.2d 397 (3d Cir. 1954), which purportedly require the courts to apply a "continuing tort" exception (Petition at 6-7). These decisions do not, however, provide petitioner the support he claims.

As the D.C. court of appeals concluded (A-11a-13a), *Fletcher*, 621 F.2d 902, was simply wrongly decided on the statute of limitations issue, and *Fowkes*, 264 F.2d 397, simply does not support petitioner's position. *See Kichline*, 800 F.2d at 359-60; *Ricard*, 750 F. Supp at 375; *Courtney*, 713 F.Supp. at 309-310; *Stokes*, 687 F. Supp at 552-53; *Lloyd*, 832 S.W.2d at 312-313.

Fourteen years ago, the Eighth Circuit Court of Appeals decided in *Fletcher* that the FELA statute of limitations is automatically tolled so long as a continuing tort of negligent assignment is being committed. *Fletcher*, however, relied

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[3] Krouse's petition specifically does not raise as an issue the D.C. court of appeals' additional holding that Krouse cannot escape the FELA's three-year limitations bar by claiming that, regardless of when he first had notice of a possible claim, he may pursue a separate cause of action for aggravation of his injury to the extent that the aggravation occurred within three years of filing (*see* A-16a-17a) (and cases cited therein). Accordingly, respondent does not address this issue, and the ample grounds for the D.C. court's conclusion, in this opposition brief.

chiefly, and mistakenly, on the Third Circuit's decision in *Fowkes*, 264 F.2d 397. *See Fletcher*, 621 F.2d at 908 (construing *Fowkes* to mean that a harmful working condition may be treated as a continuing or frequently-repeated wrong which tolls the running of the statute of limitations). *Fletcher* simply misread *Fowkes'* import, just as petitioner continues to do now. Subsequent to the Eighth Circuit's decision in *Fletcher*, the Third Circuit Court of Appeals expressly concluded in *Kichline*, 800 F.2d 356, that its earlier decision in *Fowkes* could not be read to mean that a continuing tort tolls the statute of limitations. *Kichline*, 800 F.2d at 358-360. According to the Third Circuit:

> We understand *Fowkes* to mean that **continuing conduct of defendant will not stop** the ticking of the limitations clock **once the plaintiff obtained requisite information**. On discovering an injury and its cause, a claimant must choose to sue or forego that remedy. This interpretation is supported by *Kubrick*, which requires a plaintiff to take prompt action to seek redress. (Emphasis added)

*Kichline*, 800 F.2d at 360.

*Kichline* thus exposed the Eighth Circuit's ruling in *Fletcher* as fundamentally flawed and also reveals petitioner's fatal error in relying on *Fletcher* and *Fowkes* to support his petition in this Court. *See Ricard*, 750 F. Supp at 375; *Courtney*, 713 F.Supp. at 309-310; *Stokes*, 687 F. Supp. at 552-53; *Lloyd*, 832 S.W.2d at 312. *Compare Corrigan v. Burlington N. R. R.*, 612 F. Supp. 665, 668 (D. Minn. 1985) (decided before *Kichline* and adopting *Fletcher's* erroneous interpretation of *Fowkes*). The D.C. court of appeals, therefore, properly rejected petitioner's

argument that these two decisions might justify brushing aside the limited discovery rule if there is a "continuing tort."

Petitioner insists that there is an important distinction between the many FELA occupational disease cases applying the discovery rule and his negligent assignment case (Petition at 8). Yet he cannot explain why there is any remotely persuasive distinction for purposes of the FELA's three-year statute of limitations. In both situations, a plaintiff is simply required to take reasonable steps to investigate the possibility that he or she is suffering a continuing injury due to a wrong being committed by the defendant, and will not be permitted toll the limitations period indefinitely by taking no action whatsoever to pursue a possible legal remedy.

Petitioner also tries to argue that staleness is not a problem when there is a continuing tort (Petition at 9). But that is obviously not so. Under petitioner's theory, he would be entitled to remain at his job for ten years after obtaining notice that his continued job assignments were aggravating an old ankle injury, then commence an FELA action in which he could seek recovery for injuries spanning the entire ten years. That result runs completely counter to this Court's decisions in *Urie*, 337 U.S. at 170, and *Kubrick*, 444 U.S. at 123. *See also Kichline*, 800 F.2d at 360.

The D.C. court of appeals did not deviate from applicable federal substantive law. Quite the contrary, the court faithfully adhered to the teachings of this Court in *Urie*, 337 U.S. 163, and *Kubrick*, 444 U.S. 111, and the lessons of FELA case law throughout the country, by concluding that a "continuing tort" did not excuse petitioner from pursuing an FELA action within three years of when he had notice of his potential claim.

## II. THE DISTRICT OF COLUMBIA COURT OF APPEALS' DECISION NEED NOT BE READ TO CONFLICT WITH THE DECISIONS OF THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN NON-FELA CASES

Petitioner argues that the D.C. court of appeals' decision is inconsistent with decisions of the U.S. Court of Appeals for the District of Columbia concerning the continuing tort doctrine (Petition at 10). Petitioner chiefly cites *Page v. United States*, 729 F.2d 818 (D.C. Cir. 1984), which held that in a medical malpractice action under the FTCA, the limitations period only begins to run when the tortious conduct ceases. *Page*, however, is not an FELA case, and the U.S. Court of Appeals for the District of Columbia has never had occasion to examine the "continuing tort" doctrine in the context of the FELA's limitation provision. The D.C. court of appeals, therefore, had ample grounds for concluding that the *Page* reasoning should not be applied to an FELA action, where to do so "would be at odds with the interpretation of the FELA by the more persuasive federal cases and with the purpose of the FELA statute of limitations" (A-14a-15a).

The D.C. court of appeals is not alone in declining to follow the rationale of a non-FELA case like *Page* in interpreting the FELA's three-year statute of limitations. *See, e.g., Kichline*, 800 F.2d at 360; *Stokes*, 687 F.Supp. at 554-555; *Lloyd*, 832 S.W.2d at 312-313. Moreover, at least one court has concluded that, apart from being a non-FELA action, the *Page* reasoning may be distinguished simply because it is a medical malpractice claim. *Lloyd*, 832 S.W. at 312-313. In *Kubrick*, this Court specifically acknowledged authority indicating that courts have departed from the usual statute of limitations rules when

medical malpractice claims are involved, because these claims typically involve short statutes of limitation and involve relationships in which the patient places special faith in the physician. *See Kubrick*, 444 U.S. at 121 n.7 (quoting discussion in Restatement (Second) of Torts §899, Comment e, pp. 444-445 (1979)).

The D.C. court of appeals concluded that blind application of the rationale of a non-FELA action like *Page* to an FELA action would be inconsistent with the well-developed FELA decisional authority discussed at length in Point I (*see* A-14a-15a). Since the U.S. Court of Appeals for the District of Columbia has not yet addressed the precise issue presented here, there is no reason to assume it would not be similarly persuaded by this body of authority dealing specifically with FELA actions. Accordingly, the D.C. court's decision need not be read as in conflict with decisions of the U.S. Court of Appeals for the District of Columbia.

## CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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